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In the Matter of:

**CONSENT AGREEMENT
AND
PROPOSED FINAL ORDER**

Respondents.

Proceeding for Class II Penalty under Section 309(g) of the Clean Water Act

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1 4. The Respondents agree that settlement of this matter without litigation is consistent with the
2 provisions and objectives of the CWA and applicable regulations, that it is in the public interest, and
3 that it is the most appropriate means of resolving this matter. The Respondents and EPA seek
4 approval of the Consent Agreement and move for issuance of the accompanying Final Order.

5 NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of
6 fact or law, and upon consent and agreement of the parties to this Consent Agreement and Order, it
7 is hereby AGREED, STIPULATED, and ORDERED:

8 **II. ALLEGATIONS**

9 5. EPA has jurisdiction over the subject matter of this action. The Consent Agreement contains
10 the elements of a complaint required by 40 C.F.R. §§ 22.14(a)(1)-(3) and (8).

11 6. Respondents admit the jurisdictional allegations herein. Respondents do not admit the
12 factual and legal allegations herein, and do not admit any violation or wrongdoing.

13 7. Without any admission, Respondents waive any right to contest any issue of law or fact
14 herein, or to appeal the proposed Final Order accompanying this Consent Agreement.

15 8. EPA institutes this penalty proceeding on the basis of the following allegations:

16 9. Under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), it is unlawful for any person to
17 discharge any pollutant from a point source into waters of the United States except in compliance
18 with, inter alia, a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, which authorizes
19 the EPA (and authorized States) to issue permits pursuant to the National Pollutant Discharge
20 Elimination System (“NPDES”) program.

21 10. Under Sections 301(a) of the CWA, 33 U.S.C. § 1311(a), it is unlawful for any person to
22 discharge dredged or fill material from a point source into any “navigable waters” except in
23 compliance with, inter alia, a permit issued under Section 404(a) of the CWA, 33 U.S.C. § 1344(a),
24 which authorizes the Secretary of the Army, acting through the Army Corps of Engineers (“Corps”),
25 to issue permits for the discharge of dredged or fill material into navigable waters.

26 11. The term “person” is defined under section 502(5) of the CWA, 33 U.S.C. § 1362(5), to
27 include, inter alia, “an individual, corporation, partnership, [or] association.”

12. The term “point source” is defined in CWA section 502(14), 33 U.S.C. § 1362 (14), to include “any discernable, confined and discrete conveyance” such as bulldozers and mechanized land-clearing and earth-moving equipment from which pollutants, including dredged or fill material, are discharged.

13. The term “navigable waters” is defined under section 502(7) of the CWA, 33 U.S.C. § 1362(7), to mean “waters of the United States.”

14. The term “waters of the United States” is defined to include, inter alia, (a) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce; (b) all interstate waters; (c) tributaries of waters of the United States; and (d) wetlands adjacent to such waters. 40 C.F.R. §§ 122.2 and 230.3(s), 33 C.F.R. § 328.3(a).

15. The term “pollutant” is defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6), and includes, but is not limited to, dredged spoil, solid waste, rock, sand, and industrial waste.

16. The term “discharge of a pollutant” is defined under section 502(12) of the CWA, 33 U.S.C. § 1362(12), as “any addition of any pollutant to navigable water from any point source.”

17. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), provides that the Administrator may approve a state to administer the NPDES permit program within its jurisdiction. On December 30, 2002, EPA authorized Arizona to administer the NPDES permit program for that state. 67 Fed. Reg. 79629. Thus, Section 301(a) prohibits the discharge of pollutants from a point source into waters of the United States in Arizona without inter alia, an NPDES permit issued by Arizona or EPA.

18. CWA section 402(p), 33 U.S.C. § 1342(p), specifically requires NPDES permit regulation of certain storm water discharges. An NPDES permit is required for discharges of storm water associated with industrial activity. 33 U.S.C. § 1342(p), 40 C.F.R. § 122.26.

19. The term “storm water discharge associated with industrial activity” is defined to include, inter alia, “[c]onstruction activity including clearing, grading and excavation activities except, operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is part of a larger

common plan or development or sale if the larger common plan will ultimately disturb five acres or more.” 40 C.F.R. § 122.26(b)(14)(x).

20. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).

21. Storm water discharges may be authorized under a general storm water permit issued by EPA or a state with an approved NPDES permit program. Arizona, through the Arizona Department of Environmental Quality (“ADEQ”) has issued a general NPDES permit, the AZPDES CGP, covering storm water discharges associated with construction activities specified in 40 C.F.R. § 122.26(b)(14)(x).

22. Pursuant to Arizona’s AZPDES CGP, the owners or operators of construction-related activities are required to file a Notice of Intent with ADEQ to obtain permit coverage under the AZPDES CGP prior to the discharge of storm water associated with the commencement of construction activity. AZPDES CGP Part II.A; see also 40 C.F.R. § 122.21(c).

23. At the commencement of construction activities, the AZPDES CGP requires, among other things:

a. The implementation of storm water controls (i.e., best management practices (“BMPs”)) to control pollutants in storm water discharges. CGP Part IV.D.1.

b. The implementation of erosion and sediment controls. CGP Part IV.D.2.

c. Good housekeeping, including preventing the exposure of storm water to construction debris. CGP Part IV.D.3.

d. Interim and permanent stabilization practices, e.g., vegetative stabilization. CGP Part IV.D.4.

e. Structural practices to divert flows from exposed soils, store flows, or otherwise limit runoff and the discharge of pollutants from exposed areas of the site to the degree attainable, e.g., use of sediment basins. CGP Part IV.D.5.

f. Non-storm water discharge management to minimize pollutants in any non-storm water discharges. CGP Part IV.D.7.

- g. Maintenance of BMPs to keep them in effective operating condition. CGP Part IV.E.
- h. Inspections to ensure BMPs are functional and that a storm water pollution prevention plan (SWPPP) is being properly implemented. CGP Part IV.D.H.
- i. Maintaining an updated SWPPP. CGP Part IV.D.I.
- j. Keeping the SWPPP on-site for review, or other location easily accessible during normal business hours. CGP Part IV.J.

24. On May 22, 2003, Respondent WDC obtained AZPDES coverage (#AZCON-7053) as the developer and operator of construction activities associated with development of "The Canyons at Whetstone Ranch," a residential community; and on August 23, 2004, KE&G also obtained AZPDES coverage (#AZCON-500972) as the day-to-day operator of construction activities associated with "The Canyons at Whetstone Ranch" residential community.

25. Respondent WDC is an Arizona corporation and a "person" under CWA section 502(5), 33 U.S.C. §1362(5). Respondent WDC's corporate offices are located at 6262 N. Swan Road, Ste. 200, Tucson, Arizona 85718.

26. Respondent KE&G is an Arizona limited liability corporation and a "person" under CWA section 502(5), 33 U.S.C. §1362(5). Respondent KE&G's corporate offices are located at 1601 Paseo San Luis, Ste. 202, Sierra Vista, Arizona 85635.

27. Phase I of The Canyons at Whetstone Ranch is located on approximately 100 acres of real property ("the Site") owned by Respondent WDC in Section 29, southeast portion of Section 30, northeast portion of Section 31, and northwest portion of Section 32, Township 17 South, Range 20 East, Cochise County, Arizona, to the east of State Route 90, approximately 3 miles south of Interstate Highway 10 (I-10), to the west of the San Pedro River.

28. The Site contains unnamed washes that are tributary to the San Pedro River (the "Unnamed Tributaries").

29. The San Pedro River is a water of the United States within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the Unnamed Tributaries are thus also waters of the United States. The San Pedro River is tributary to the Gila River, which is a water of the United States that

1 is tributary to the Colorado River, which is a navigable-in-fact water and water of the United States
2 within the meaning of Section 502(7), 33 U.S.C. § 1362(7). *See also* 40 C.F.R. § 230.3(s).

3 30. Beginning on or about September 1, 2004, Respondents jointly commenced construction,
4 including grading and other land disturbing activity, at the Site of The Canyons at Whetstone Ranch
5 Phase I.

6 31. On February 16, 2005, EPA, ADEQ, and the U.S. Army Corps of Engineers (“Corps”)
7 inspected the Site, and EPA identified several waters of the United States at the Site that are
8 tributary to the San Pedro River.

9 32. Based on information obtained by EPA during and after the February 16, 2005 inspection,
10 EPA alleges that Respondents violated the requirements of the AZPDES CGP from September 1,
11 2004, the date of the construction at the Site commenced, and July 1, 2005, the date Respondents
12 certified to EPA they came into compliance with their AZPDES permits, by:

- 13 (a) failing to implement the SWPPP and/or BMPs necessary to reduce and prevent
14 pollutants for certain pollutant sources associated with its construction activities,
- 15 (b) by failing to properly conduct storm water inspection of the Site, and
- 16 (c) by failing to otherwise effectively minimize the quantity of sediment and other
17 pollutants discharged in storm water from the disturbed areas to waters of the United
18 States.

19 33. Based on the foregoing, EPA finds that the Respondent discharged storm water containing
20 pollutants into waters of the United States in violation of the AZPDES CGP, and thus in violation of
21 Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

22 34. Each discharge of pollutants constitutes a separate violation of CWA section 301(a), 33
23 U.S.C. § 1311(a).

24 35. From September 1, 2004, and February 16, 2005, the date of EPA’s CWA compliance
25 inspection of the Site, Respondents conducted dredge and fill activity below the ordinary high water
26 mark of the Unnamed Tributaries, and on adjoining upland areas on the Site. In this process,
27 Respondents left behind berms, and stockpiles of dredge and fill material below the ordinary high

1 water mark of the Unnamed Tributaries. In addition, Respondents placed rip-rapped pad fills and
2 storm water controls, such as silt fences and fiber rolls, below the ordinary high water mark of the
3 Unnamed Tributaries, which blocked or altered the natural water flows in these waters of the United
4 States.

5 36. EPA alleges that Respondents did not obtain authorization to discharge dredged or fill
6 material to waters of the United States pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior
7 to discharging dredged or fill material in waters of the U.S.

8 37. By discharging pollutants, i.e., dredged or fill material, into waters of the United States
9 without a Section 404 permit under the CWA, EPA finds that Respondents violated section 301(a) of
10 the CWA, 33 U.S.C. § 1311(a).

11 38. Each day that the Respondents discharged dredged or fill materials into waters of the
12 United States on the Site constitutes a separate day of violation of CWA section 301(a), 33 U.S.C. §
13 1311(a).

14 **III. PENALTY**

15 39. Based on consideration of the factors under CWA section 309(g)(3), 33 U.S.C. §
16 1319(g)(3), EPA has determined that it is appropriate to assess, and Respondents have, without
17 admission, agreed to pay to the United States, a civil administrative penalty in the amount of **one**
18 **hundred and ten thousand dollars (\$110,000.00).**

19 40. Payment of penalty must be received in accordance with one of the acceptable methods of
20 payment on or before **thirty (30) calendar days** after the effective date of the CAFO. The date by
21 which payment must be received by the United States shall be the “due date” for the payment.

22 41. Respondents shall make payment under this CAFO in accordance with any of the
23 acceptable methods of payment listed in Exhibit A, “EPA Region 9 Collection Information,” which
24 is incorporated by reference as part of this CAFO. Concurrent with payment of the penalty,
25 Respondents shall provide written notice of payment, referencing the title and docket number of this
26 case and attach a photocopy of the penalty payment, via certified mail to each of the following:

Jason Brush
Water Division (WTR-8)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

and

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

42. If the penalty is not paid when due, interest shall accrue on any overdue amount from the first date after the due date through the date of payment, at the interest rate established by the Secretary of the Treasury under 31 U.S.C. § 3717. In addition, a late payment handling charge of fifteen dollars (\$15.00) will be assessed for each thirty (30) day period (or any portion thereof) following the due date in which the balance remains unpaid. Payment of any interest and late handling charges shall be made in accordance with paragraph 41 above.

43. Failure by Respondents to pay the full penalty when due entitles EPA and the United States to bring a civil action to recover the amount assessed. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. In such an action, Respondents shall pay (in addition to any assessed penalty, interest, and monthly handling charges) attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondents' penalties and nonpayment penalties which are unpaid as of the beginning of such quarter. CWA section 309(g)(9), 33 U.S.C. § 1319(g)(9).

44. The civil penalty, and any interest, late handling fees, or late penalty payments provided for in the CAFO, shall not be deducted from Respondents', or any affiliated entity's, federal, state or local taxes.

IV. GENERAL PROVISIONS

45. The Respondents knowingly and voluntarily enter into this Consent Agreement in full and final settlement of the civil administrative penalty liabilities for the specific alleged CWA violations alleged herein. Respondents have read the CAFO, understand its terms, find it to be reasonable, and consent to its terms and issuance of the Final Order, without admission of any factual or legal allegations.

1 46. This CAFO, inclusive of all exhibits and attachments, is the entire agreement between
2 EPA and the Respondents to resolve EPA's civil penalty claim against Respondents for the specific
3 CWA violations alleged herein.

4 47. This CAFO, and Respondents' full compliance with it, shall in no way affect the right of
5 EPA or the United States to pursue any and all injunctive or other equitable relief or criminal
6 sanctions for any violations of law, including but not limited to the right to bring further actions for
7 matters not specifically alleged herein.

8 48. This CAFO is not a permit, and it does not constitute a waiver, suspension or
9 modification of the requirements of any federal, state, or local permit, or statute, ordinance,
10 regulation, or order, including but not limited to any CWA requirements, permits or orders.

11 49. This CAFO shall in no way affect the right of EPA or the United States against any third
12 party (person/entity not a party to this CAFO) or the right of any third party against Respondents.
13 This CAFO does not create any right in or grant any cause of action to any third party.

14 50. EPA reserves any and all legal and equitable remedies available to enforce this CAFO,
15 and the right to seek recovery of any costs and attorney's fees incurred by EPA in any actions
16 against either or both Respondents for noncompliance with this CAFO.

17 51. Except as set forth in Paragraphs 44 and 50, EPA and the Respondents shall each bear
18 their own costs and attorneys fees incurred in this proceeding.

19 52. Respondents agree not to contest the validity of any terms and conditions set forth in this
20 CAFO in any action to enforce, or arising from, the CAFO. Respondents waive, without any
21 admission, any right to contest any issue of fact or law herein, or to seek a hearing, judicial review,
22 or appeal of the Final Order.

23 53. The provisions of this CAFO shall be binding upon Respondents, their officers,
24 directors, agents, servants, employees, successors, assigns and subsequent purchasers. Changes in
25 ownership, including but not limited to any transfer of assets of real or personal property, shall not
26 alter Respondents' obligations under this CAFO.

1 **V. PUBLIC NOTICE**

2 54. This Consent Agreement is subject to the requirements of CWA section 309(g)(4), 33
3 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b), which provide for a thirty (30) day public notice of,
4 and a reasonable opportunity for comment on, the Consent Agreement.

5 55. EPA reserves the right to withdraw from or withhold its consent to this Consent
6 Agreement if public comment discloses material information that was not considered by EPA in
7 entering into this Consent Agreement. In such case, Respondents' obligations under this document
8 shall terminate, and EPA may pursue any and all enforcement options as provided by law. If no
9 comment is timely received during the thirty (30) day comment period regarding the Consent
10 Agreement, EPA shall file the Final Order.

11 **VI. EFFECTIVE AND TERMINATION DATES**

12 56. This CAFO shall take effect on the date the Final Order is filed with the Regional
13 Hearing Clerk, and shall terminate when Respondents have complied with this CAFO in full.

14
15 **CONSENTING PARTIES**

16
17 For Respondent Whetstone Development Company:

18
19 BY: _____ DATE: _____
20 Pat Lopez, President & CEO

21 For Respondent KE & G Development LLC:

22 BY: _____ DATE: _____
23

24 For U.S. Environmental Protection Agency, Region IX:

25 BY: _____ DATE: _____
26 Alexis Strauss, Director
27 Water Division
United States Environmental Protection Agency, Region IX

1
2 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
3 **REGION IX**

4
5 **In the Matter of:**

Docket No. CWA-09-2006-0003

6 **The Canyons at Whetstone Ranch Phase I**

FINAL ORDER

7 **Whetstone Development Company, an**
8 **Arizona corporation,**
9 **and**
10 **KE & G Development LLC, an Arizona**
11 **limited liability corporation,**

Class II Proceeding under Section 309(g)
of the Clean Water Act and
40 C.F.R. §§ 22.13 and 22.18

12 **Respondents.**

13 Whereas the United States Environmental Protection Agency, Region IX, and Respondents
14 Whetstone Development Company ("WDC") and KE & G Development LLC ("KE&G"), have
15 entered into the foregoing Consent Agreement pursuant to 40 C.F.R. §§ 22.13 and 22.18, IT IS
16 **HEREBY ORDERED THAT:**

17 1. The foregoing Consent Agreement and this Final Order (Docket No. CWA-09-2006-0003)
18 be entered; and

19 2. Respondents shall pay a civil penalty of one-hundred and ten thousand dollars (**\$110,000.00**)
20 to the Treasurer of the United States of America in accordance with the terms set forth in the
21 Consent Agreement.

22 This Final Order shall become effective on the date that it is filed with the Regional Hearing
23 Clerk, United States Environmental Protection Agency, Region IX, San Francisco, California.

24 **DATE:** _____

25 Joanna DeLucia
26 Regional Judicial Officer
27 EPA - Region IX
28 75 Hawthorne Street
San Francisco, California
94105

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
2 REGION IX

3
4
5 In the Matter of:

Docket No. CWA-09-2006-0003

6 The Canyons at Whetstone Ranch Phase I

7 Whetstone Development Company, an
8 Arizona corporation, and
9 KE & G Development LLC, an Arizona
limited liability corporation,

10 Respondents.

CERTIFICATE OF SERVICE

Class II Proceeding under Section 309(g)
of the Clean Water Act and
40 C.F.R. §§ 22.13 and 22.18

11
12 Class II Proceeding under Section 309(g) of
the Clean Water Act
13

14
15 The undersigned hereby certifies that the original CONSENT AGREEMENT and FINAL
16 ORDER was delivered via certified mail, return receipt requested to Respondents, care of:

17 Alan Glen
Smith, Robertson, Elliot, Glen, Klein & Bell, L.L.P.
18 1717 West 6th Street, Ste. 300
Austin, Texas 78703
19

20 Patrick Lopez
Rusing & Lopez, P.L.L.C.
21 6262 North Swan Road, Suite 200
Tucson, Arizona 85718
22

23
24 Date: March _____ 2006

By: _____
Danielle E. Carr
Regional Hearing Clerk
Region IX
Office of Regional Counsel

25
26
27
28 CONSENT AGREEMENT and
FINAL ORDER

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EPA-R9-ORC
Attn: Rich Campbell
75 Hawthorne Street (ORC-2)
San Francisco, California 94105